

UNITED STATES COURT OF APPEALS FOR THE DISTRICT  
OF COLUMBIA CIRCUIT

Norman Clement, Petitioner

Case: No. 21-1262

Drug Enforcement Administration, Respondent

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POWER YIELDS NOTHING WITHOUT A DEMAND NEVER  
HAS NEVER WILL

MOTION FOR A REHEARING UNDER FEDERAL RULES OF  
APPELLATE PROCEDURE, RULE 35

The Appellant moves, pro se, submits this Petition request under Rule 35 before entire Panel for Rehearing En Banc from a May 25, 2022 decision , barring a summary reversal of the DEA Administrative court and further based on United States Supreme Court ruling in Ruan-Khan vs. United States case: No- 20-1410. Appellant is a Pharmacist Not a Street Drug Street and demands return of DEA control registration and this court rewards compensatory damage \$587 million US and punitive compensation of \$8.6 billion dollars US (see Sigars report (3))

## **STATEMENT AT ISSUE**

I am a Pharmacist Not a Street Drug Dealer. On June 27, 2022, in a separate and related case ruling 9-0 of the United States Supreme Court Justice Stephen Breyer in summary wrote for the majority that prosecutors must prove that doctors knew they were illegally prescribing powerful pain drugs in violation of the federal Controlled Substances Act once a doctor proves that they are authorized to prescribe a controlled substance (e.g., has state & federal registration), the government must PROVE BEYOND A REASONABLE DOUBT that doc KNEW or INTENDED that their prescribing conduct was unauthorized under the CSA.

## **FACTUAL BACKGROUND**

On August 29, 2019, in the city of Tampa, Florida, Hillsborough County, Pronto Pharmacy was raided by DEA agents. Norman Clement was acting in the capacity of a licensed's pharmacist. Whereby a Pharmacist is a person who is professionally qualified to prepare and dispense medicinal drugs. This definition and is a statute within the Florida Administrative Code & Florida Administrative Register.

The officer acted upon an oath to enter the premises to secure evidence of violations of 21 U.S.C. §§ 841(a)(1) (possession with the intent to distribute and distribution of oxycodone and hydromorphone. Such action by the DEA, was improper. (1)

The DEA agents removed files with the intent of searching to discover items to suggest a criminal act took place or is taking place. This is not implied within the warrant, and the act of looking to find an illegal act is not supported by probable cause.

**Issue:**

**The Appellant is a licensed Pharmacist not a street drug dealer engaged in drug trafficking. Pronto Pharmacy lacked requisite scienter and/or an intent to defraud.** Pronto's Pharmacy had DEA control registration and The Appellant, owner of Pronto Pharmacy is a licensed pharmacist authorized to fill and have in its possession control medication prescriptions. **Pronto Pharmacy was searched and properties seized by the DEA. The Appellant was never indicted, arrested and patients listed in the warrant continued to get their same medications written by the same doctors filled at other pharmacies as we were able tracked them for nearly 2 years.**

**The DEA searched and seized video exculpatory equipment that has not been returned. Such action by the DEA, was improper. The Court can redress the harm. Abolitionist Frederick Douglas stated 1867 "Power yields nothing without a demand never has and never will," and we demand return of our Control Substance registration and both compensatory and punitive damages.**

**Rule:** Opinion of Supreme Court Ruan vs United States:

*The Control Substance Act excepts, for example, licensed professionals such as dentists, veterinarians, scientific*

*investigators, and pharmacists from the prohibition on dispensing controlled substances. See 21 U. S. C. §802(21).*

## **Analysis**

*Ruan* provides : “ A strong scienter requirement helps reduce the risk of “overdeterrence,” i.e., punishing conduct that lies close to, but on the permissible side of, the criminal line.”

Pursuant to an subjective evidentiary standard of “ preponderance of evidence, ” Pronto Pharmacy’s DEA registration was revoked . Furthermore, the basis for the opinions expressed by the DEA’s expert witness allegations, were speculative. An objective standard of care was not proven. The revocation used the improper evidentiary standard.

## **Conclusion**

Doctors and Pharmacist are not Street Drug Dealers in White Coats.

1. Illegal street drugs are not of identical, fungible, potency, or carry equivalent degrees of fatal diversion and addiction risks to DEA-Scheduled, FDA- supervised, and controlled prescriptions drugs. The purity, doses, chemical structure, bioequivalence and / or means of intake of illegal street drugs versus DEA – scheduled / FDA- supervised medications are different. Street drugs and prescription drugs are not equivalent.
2. Illegal street drugs and DEA-Scheduled, FDA- supervised medications require different registered users. Doctors and pharmacist register with the DEA. Street drug dealers register with the Mexican / Columbian / or Russian Drug Cartels.

3. Illegal Street Drugs Dealer and the DEA Registrant doctor are not equivalent. The doctors prescribe DEA-Scheduled, FDA-Supervised medications, with “intent to treat”. On the other hand, street drug dealers act in furtherance of supremacy in the international illicit drug market.
4. Doctors and pharmacist receive formal education from accredited schools of graduate education. Illegal street drug dealers receive informal education from the jails, the streets, and the Mexican / Columbian / Russian Drug Cartels.
5. Doctors and pharmacist settle disputes with patients in the court system. On the other hand, drug dealers settle disputes via gang fights while using deadly weapons. The weapons are used with intent to kill, intent to cause grievous body harm, or felony murder.
6. In conclusion, the education, experience, conduct, and registration of DEA registered doctors and street drug dealers are not the same.
7. Doctors and pharmacists are not drug dealers in white coats.

The appellant is a Pharmacist engaged in the practice of pharmacy and not a drug dealer drug street dealer and demands return of all properties seized by the United States Drug Enforcement administration (DEA)

**BACKGROUND THE CONTROLLED SUBSTANCES ACT ONLY CRIMINALIZES ACTIVITIES OUTSIDE THE USUAL COURSE OF A DOCTOR’S PROFESSIONAL PRACTICE.**

**FREDERICK DOUGLAS AN AMERICAN ABOLITIONIST  
REMINDS US “POWER YIELD NOTHING WITHOUT A  
DEMAND NEVER HAS NEVER WILL.”**

The Appellant is a license pharmacist engaged in the practice of practice of pharmacy filing prescriptions legitimate medical use authorize by medical/dental providers license and authorize to treat patients. This means that the doctor must have known or intended to prescribe outside the legit bounds of medical practice. Not enough for DEA to say "we think this is outside the bounds." Must prove that doctor knew it was outside the bounds.

**WALMART VS. UNITED STATES DEPARTMENT OF  
JUSTICE**

In his Nov. 19 order staying the Walmart case, U.S. District Judge Colm F. Connolly said the criminal cases (Ruan-Khan vs. United States No: 201410) before the Supreme Court will determine “what it means for a prescriber to depart from the usual course of medical practice in writing prescriptions; the answer to that question will shed considerable light on what it means for a pharmacist to depart from the usual course of pharmacy practice when filling them.”

“The Supreme Court’s description of those circumstances will likely affect how pharmacists may be held liable for knowingly filling invalid prescriptions,” he concluded.

While the primary responsibility for prescribing opioids is on doctors, federal law assigns pharmacists with a “corresponding responsibility” not to knowingly fill improper scrips. The chain stores argue the DOJ asserts an excessively loose standard in the Walmart lawsuit, under which pharmacists break the law if they fill a prescription with any one of a number of “red flags,” such as

whether the prescribing doctor is from another city or the patient is paying in cash.

“Under DEA’s theory, the presence of one or more ‘red flags’ not only proves that a prescription is illegitimate but that a pharmacist who fills it must be doing so ‘knowingly,’” the chain stores say. “When presented with a facially valid prescription, however, a pharmacist cannot be expected to second-guess the prescriber’s medical judgment that the prescribed medicine is appropriate, to interrogate the patient regarding whether they actually need the prescribed medication, or to obstruct the patient’s care by withholding it.”

### **RUAN-KHAN ORAL ARGUMENT**

At oral arguments in March, Supreme Court justices wrestled with the meaning of the Controlled Substances Act and how the traditional requirement the government prove mens rea, or guilty knowledge, in criminal cases fits with subjective standards for practicing medicine. The government argued defendants only need to prove they engaged in an “honest effort” to practice medicine, meaning they didn’t completely abandon their professional training by handing out prescriptions without performing a medical examination or assessing the patient’s needs.

Justice Neil Gorsuch had a problem with that, at one point saying to the government’s lawyer, Eric Feigen, “objective honest efforts is like a -- a contradiction in terms.”

Chief Justice John Roberts later said: “Is there a book that tells us what the right amount of medication is for a certain kind of disability? The answer is there is no such book, and that’s the whole problem.”

Lawyers for Ruan and Kahn urged the court to adopt a stricter definition, under which doctors can be subjected to criminal liability only if they knowingly violate the law. The pharmacy chains agree, saying the government's stance in the Walmart lawsuit is equivalent to strict liability, where any violation of a professional standard, written or unwritten, renders a prescription invalid and illegal to fill.

**SUNTREE PHARMACY and SUNTREE MEDICAL  
EQUIPMENT VS. DRUG ENFORCEMENT  
ADMINISTRATION**

**PETITION FOR CERTIORARI**

AUGUST 3, 2022

On February 14, 2022, a three-judge panel of the Eleventh Circuit upheld the DEA Administrator's decision to revoke Suntime Pharmacy's DEA registration interpreting 21 C.F.R. § 1306.04(a) to not require evidence of a prescription's illegitimacy before deciding it was dispensed in violation of the regulation.

The DEA Administrator has interpreted § 1306.04(a) so that prescriptions filled in the face of unresolved "red flags" are not "issued for a legitimate medical purpose"; whether or not the prescriptions are actually illegitimate. *See Holiday CVS, LLC, d/b/a CVS/Pharmacy Nos. 219 and 5195*, 77 Fed. Reg. 62316, 62341 (2012) (declaring the "DEA has interpreted the "legitimate medical purpose" feature of the corresponding responsibility duty "as prohibiting a pharmacist from filling a prescription for a controlled substance when he either knows or has reason to know that the prescription was not written for a legitimate medical purpose . . .").

There, the DEA Administrator found that Holiday CVS violated its corresponding responsibility under § 1306.04(a) solely on the basis that it filled controlled substance prescriptions without resolving “red flags”. *Id.* at 62342-45. Holiday CVS argued that these “red flags” were based on the testimony of one “expert” witness and were not supported by case law, administrative decision, or published DEA guidance. *Id.* at 62317-18. Relying on his—and the DEA’s—prior decisions, the Administrator simply responded that DEA precedent dictates the DEA interprets the “legitimate medical purpose” feature of the corresponding responsibility duty as prohibiting a pharmacist or pharmacy from filling prescriptions with unresolved “red flags”. *Id.* at 62341.<sup>1 2</sup>

The Suntime Pharmacy and Medical Equipment Certiorari Petitioners asserts:

“ This vague regulation is fraught with misconceptions. In *Gonzales*, the Attorney General thought he could interpret “legitimate medical purpose” under § 1306.04(a). *Gonzales v. Oregon*, 546 U.S. 243 (2006). The Court explained, however, he exceeded his limited authority under the Act. *Id.* More recently, a circuit split as to whether “knowingly” applied to “except as authorized” under the CSA brought the regulation back before the Court. *Ruan v. United States*, 597 U.S. \_\_\_\_ (2022) (slip op.).

In this case, the DEA’s interpretation of § 1306.04(a) is unreasonable given the “near equivalence” of the regulation to the statutes in the CSA. This “near equivalency” means that it is these statutes the DEA has interpreted and not the regulation— power Congress has not entrusted to the DEA. The DEA’s interpretation is also unreasonable because it is inapposite given the Court’s characterization of willful blindness, which requires the existence of the fact a defendant is found willfully blind of. Here, that fact being

whether the prescriptions Suntree Pharmacy filled were not issued for a legitimate medical purpose.

Further, even if the DEA's interpretation of § 1306.04(a) is held reasonable, *Auer* deference is still inappropriate because an independent inquiry into the character and context of the DEA's interpretation reveals it is not entitled to controlling weight. This is because the DEA's interpretation removes § 1306.04(a) from the highly technical and specialized sphere of science and medicine, and instead, places the regulation directly into the purview of the Court.

*Auer* deference is also inappropriate because the DEA's interpretation does not reflect its fair and considered judgment and "unfairly surprises" pharmacies. Rather than fair and considered judgment, the DEA simply drafted § 1306.04(a) parroting the statutes Congress drafted as part of the CSA. This creates an "unfair surprise" not only because the statutes in the CSA with identical language are enforced disparately, but also because the DEA failed to use notice-and-comment rulemaking in expanding the regulation's reach beyond the statutes of the CSA that it parrots.

The DEA has developed a range of regulations to monitor and control provider registration for prescribing and dispensing controlled substances. One such regulation, 21 C.F.R. § 1306.04(a), places a corresponding responsibility on pharmacists and pharmacies to refuse to fill prescriptions that are not issued for a legitimate medical purpose. The DEA has interpreted § 1306.04(a) so that a pharmacy violates its corresponding responsibility if it fills controlled substance prescriptions without resolving "red flags".

Under this interpretation, the DEA Administrator need not determine the underlying legitimacy of the prescriptions a pharmacy filled, but rather, may use “red flags” as a proxy to presume a prescription was illegitimate.

Although § 1306.04(a) has been held genuinely ambiguous, the DEA’s interpretation of the regulation is not entitled to the [*Auer*] deference customarily awarded to an agency when it interprets its own regulation. This is because *Auer* deference is only appropriate where an agency’s interpretation of its genuinely ambiguous regulation is reasonable and an independent inquiry into the character and context of the agency’s interpretation entitles it to controlling weight.

Finally, the DEA’s interpretation of § 1306.04(a) is not entitled to *Auer* deference because this is an “extraordinary case” and there is no “clear congressional authorization” supporting the authority the DEA has improperly acquired from its interpretation. Specifically, under its interpretation, the DEA has declared an entire class of activity—filling (*i.e.*, dispensing under § 841(a)) a prescription for a controlled substance with unresolved “red flags” whether or not the prescription was issued for a legitimate medical purpose—a criminal violation of the CSA. The Court, however, has recognized that the Attorney General’s— who the DEA draws its power from— authority under the CSA is limited to registering physicians and scheduling drugs. The CSA therefore contains no “clear congressional authorization” supporting the DEA’s authority to criminalize an entire class of activity.

Accordingly, the Court should not defer to the DEA’s improper interpretation of § 1306.04(a) and instead should enforce the regulation so that it reflects the Court’s prior decisions, Congress’ intent, and does not “unfairly surprise” pharmacies. The Court

should therefore hold that a violation of a pharmacy's corresponding responsibility requires a determination of the legitimacy of the prescriptions it filled, and further, that this determination uncover prescriptions were "not issued for a legitimate medical purpose".

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<sup>1</sup> The DEA Administrator cited to the following decisions: *Sun & Lake Pharmacy, Inc.*, 76 Fed. Reg. 24523, 24530 (2011); *Liddy's Pharmacy, LLC*, 76 Fed. Reg. at 48895; *East Main Street Pharmacy*, 75 Fed. Reg. 66149, 66163 (2010); *Lincoln Pharmacy*, 75 Fed. Reg. 65667, 65668 (2010); *Bob's Pharmacy*, 74 Fed. Reg. at 19601; *Carlos Gonzalez*, 76 Fed. Reg. 63118, 63142 (2011) (citing *Holloway Distrib.*, 72 Fed. Reg. 42118, 42124 (2007)).

<sup>2</sup> Other decisions include: *Paul J. Volkman*, 73 Fed. Reg. 30,630 (2008) (discussing drug cocktails issued by physician for oxycodone, benzodiazepines and carisoprodol, expert testimony of abuse potential of these drugs, and red flag of patient travelling long distance to fill prescriptions); *George Pharmacy, Inc.; Decision and Order*, 87 Fed. Reg. 211,45 (2022) (finding a pharmacy violated its corresponding responsibility because it filled prescriptions with unresolved "red flags"); see e.g., ***Pronto Pharmacy, LLC; Decision and Order*, 86 Fed. Reg. 647,14 (2021)**; *Superior Pharmacy I and Superior Pharmacy II; Decision and Order*, 81 Fed. Reg. 313,09 (2016); *The Medicine Shoppe; Decision and Order*, 79 Fed. Reg. 595,04 (2014); *Health Fit Pharmacy; Decision and Order*, 83 Fed. Reg. 243,48 (2018).

## CONCLUSION

Abolitionist Frederick Douglas "Power yield nothing without a demand never has never will." The rule of law is the most fundamental concept of our country without it our society crumbles it allow for an agency to take anything they want unchecked based on their own manufactured rules and misinterpretation of laws, medical procedures guidelines creating their own science and facts

and the great fear at the moment is the DEA operates unchecked as a rogue sub agency of government operating outside the rule of law creating their medical science. Auer deference seizing property using unipotent of ill gotten gain. The results of their actions are thousands of people have needlessly died form chronic diseases of intractable pain and more suffer because practitioners are in fear of being imprisoned assets frozen and stolen by this unchecked agency and our best a brightest in medical profession are being imprisoned. Where we demand this court restore the rule of law and bring this unchecked agency into line or declare their actions unconstitutional and send a very strong message in punitive compensation. Wherefore this appellant request demands

The Appellant is a license pharmacist engaged in the practice of practice of pharmacy filing prescriptions legitimate medical use authorize by medical/dental providers license and authorize to treat patients thus demands that the Court vacates the Order of Revocation of Pronto's Pharmacy DEA registration. In the alternative, remand the case back to the trial court for adjudication under the proper evidentiary standard.

**WHEREFORE, WE DEMAND UPON THIS COURT:**

1. Grant this motion and reverse these findings and decision of the Administrative Court, return and restore all privileges of the DEA Control Registration Certificates of Pronto Pharmacy LLC.
2. Further, Dismiss the Decision of the Administrative Judge Mark Dowd in agency case No: 19-42, Federal Registry filed 1927282 on December 20, 2021 with extreme prejudice.
3. Return all Files, Equipment, Medication to Pronto Pharmacy Llc and its owner Norman J Clement of Tampa, Florida.
4. The Court must send a clear and strong message in its final order to the deliberate misguided actions of the DEA we therefore Amend the Reward damages and penalties of amounts greater than \$8.7 billion U.S. dollars.

August 12, 2022

DEMAND RESPECTFULLY SUBMITTED Norman J Clement  
Norman J Clement, pro se

#### Table of Authorities

1. <https://corporate.walmart.com/newsroom/2020/12/22/a-misguided-department-of-justice-lawsuit-forces-pharmacists-between-patients-and-their-doctors>

2. <https://youarewithinthenorms.com/2021/08/31/your-doctors-and-pharmacists-are-not-the-source-of-illegal-opioids-the-dead-is/>
3. <https://www.sigarmil/pdf/lessonslearned/SIGAR-18-52-LL.pdf#page=68>

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2022 a true and correct copy of the foregoing was filed through US MAIL EXPRESS upon the following:

I, Norman J Clement, hereby certify that I and agree to utilize jointly the foregoing Respondent's Notice of Filing the Certified List of the Record with the Clerk of the Court for the

United States Court of Appeals for the District of Columbia Circuit, by using US MAIL on August 12, 2022. I certify further that Petitioner is *pro se*, and that service will be accomplished by electronic mail to:

Anita Gay, Esq United States Department of Justice Criminal Division/ Narcotic and Dangerous Drugs Section 145 N Street, NE, Room 2E-404 Washington, D.C. 20002 (202) 353-7629  
[anita.gay2@usdoj.gov](mailto:anita.gay2@usdoj.gov)

Norman J Clement

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